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(1) 931620 APR 11 1994

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

SHINE, JULIANELLE, KARP, BOZELKO & KARAZIN, P.C.,

Respondent,

-vs-

RICHARD RUBENS and BARBARA RUBENS,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

By:

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Questions Presented for Review

I Was the Fifth Amendment of the Constitution violated when the Rubens were deprived of property without due process of law?

II Was the Fourteenth Amendment of the Constitution violated when the Supreme Court of the State of New York, County of Bronx decided that a Connecticut judgment obtained by default against the Rubens and by fraudulent and deceptive means in violation of the Rubens' right to Due Process of Law was enforceable under N.Y.S. CPLR Section 5400? Did this violation continue when the Supreme Court of the State of New York Appellate Division: First Department affirmed and the State of New York Court of Appeals dismissed the Rubens appeal on the ground that no substantial Constitutional question was directly involved?

Opinions Below

On January 13, 1994 the State of New York Court of Appeals denied reargument of their October 12, 1993 Decision granting Respondent Shine's Motion to Dismiss Rubens' Appeal upon the ground that no substantial constitutional issue was directly involved. The Supreme Court of the State of New York, Appellate Division, affirmed the Order of Supreme Court, Bronx County which denied the motion by Rubens to vacate a Connecticut Default Judgment. This Decision was entered on April 6th, 1993 and Rubens Reargument was denied on June 15th, 1993.

STATEMENT OF JURISDICTION

Petitioner, RICHARD D. RUBENS, Pro Se, moves this Honorable Court now for a Writ of Certiorari and review of the Order of the New York State Court of Appeals entered in the above-entitled cause on January 13, 1994.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Five of the Constitution of the United States provides that: "No person shall be ... deprived of ...property, without due process of law". Amendment Fourteenth of the Constitution of the United States provides that: "No State shall make or enforce any law which shall abridge the privileges ... of citizens of the United States; nor shall any State deprive any person's property; without due process of law".

STATUTORY PROVISIONS INVOLVED

New York State Civil Practice Laws and Rules Section 5400 provides that Sister State Judgments not obtained by default in appearance shall be treated in "the same manner as a judgment of the Supreme Court of this State. A Judgment so filed has the same effect and is subject

to the same procedures, defenses and proceedings for reopening, vacating ... as a judgment of a Supreme Court of this State."

STATEMENT OF THE CASE

On March 12, 1988 Respondent,sued Petitioner Rubens for payment of a highly disputed bill for services rendered to the Rubens' Corporation. Respondent chose to sue in Connecticut State Court even though Rubens were residents of the State of New York. Rubens were served at their business and Southampton Residence. Rubens answered Pro Se with affirmative defenses eager to participate and win at trial.

There was no response to Rubens' affirmative defenses by Respondent and the Connecticut Court suggested that Rubens move to dismiss. Rubens made a Motion to Dismiss for Respondent's failure to respond to their affirmative defenses using their Bronx address. Rubens received

no further notices from Respondent Shine and assumed that they abandoned their frivolous claim. Rubens were wrong - they received a New York State Sheriff Execution on their Homestead in Southampton based on a default judgment obtained in Connecticut, registered in Bronx Supreme Court under CPLR Secton 5400 without any notice whatsoever.

Based on the Sheriff's Execution Notice, Rubens moved by Order To Show Cause in Bronx Supreme Court to vacate the Connecticut Judgment.

Rubens based the Motion on affirmative defenses, excusable default, fraud and misrepresentation, lack of due process in every step of the proceeding in Connecticut. Respondents misrepresented to the Connecticut Court that they properly notified Rubens of every step of the proceeding when in fact Rubens never received any further notices after the

Summons and Complaint. Respondents obtained a default Judgment and waited over one (1) year to register the Judgment in the New York State Supreme Court, Bronx County under N.Y. CPLR Section 5400 enforcement of Sister State Judgments. The Respondent did not notify Rubens of the Default Connecticut Judgment nor did they notify Rubens of the registration of the Judgment under Section 5400. Rubens did receive notice by way of an execution Sale of their Residence in Southampton, New York by the Sheriff of Suffolk County. Rubens acting Pro Se moved by Order To Show Cause in Bronx County, Supreme Court to argue that the judgment was not entitled to the Section 5400 registration privilege and therefore should not be enforceable by the State of New York.

The Constitutional issue of lack of due process of law afforded Rubens by Respondents was brought to light in Rubens

Reply Affidavit submitted to Judge Anita Florio. "Since this default judgment was procured by fraud and since there was no DUE PROCESS in its procurement it should not only be set aside under Section 5400 but should be rendered by this Court VOID and UNENFORCEABLE".

In the Rubens' Sur-Reply Affidavit they go on to state "Now this Plaintiff (Robert Julianelle) comes before this Court and FALSELY SWEARS in his paragraph #7 that 'On November 17, 1989, a pre-trial settlement conference was conducted with the parties present and as a result thereof, a trial was scheduled...'. This FALSE statement by the Plaintiff exemplifies his Fraudulent Conduct and should be sanctioned by this Court. Since this default Judgment was procured by fraud and since there was no DUE PROCESS OF LAW afforded us in defense of that procurement the Judgment should not only

be set aside under Section 5400, but it should be rendered by this Court void and unenforceable."

In the Brief of Rubens as Defendant Appellants to the New York State Supreme Court Appellate Division First Department one of the QUESTIONS PRESENTED for review stated "Is the Constitutional Right to Due Process of Law an absolute requirement to Sister State Judgments sought to be enforced in this State under CPLR Section 5400? The Court below did not address this question. It is the appellants contention that a Sister State Judgment procured through the fraudulent, malicious and underhanded devices of Plaintiffs without requisite notices to allow Defendants a full and fair opportunity to appear at trial and litigate the issues on the merits amounts to the denial of DUE PROCESS and such judgment may be declared void and unenforceable by Courts

of this State."

In the Rubens' Affidavit in Support of their Motion to Reargue the decision of the Appellate Division they stated: "Our 5th and most important point seems to have been completely overlooked. We argued that Article 5400 of the CPLR should not be available to Sister State Judgments which are procured without affording defendants their constitutional rights to **DUE PROCESS OF LAW.** The right to a prior hearing has long been recognized by the Supreme Court under the Fourteenth and Fifth Amendment of the Constitution and the Court has traditionally insisted that whatever its form, opportunity for a fair hearing must be provided before deprivation of a right takes effect. Minimal procedural due process is that parties whose rights are to be effected are entitled to be heard and in order to enjoy that right they must be notified. It has long been recognized

that fairness can rarely be obtained by secret one-sided determination of facts decisive of rights.

Where important decisions turn on questions of fact due process requires an opportunity to confront and cross-examine witnesses. It is clear from the record that no due process requirements were afforded us in the Judgment at bar. In the the the case of Summerour and Associates it was indicated by this Court that had there been any due process violations results would have been different. This Court held almost ten years ago that 'since the defendant had not demonstrated that Georgia judgment was procured in violation of any due process requirement or was the result of fraud, Special Term committed error in granting a motion to vacate.'

It would seem to follow as a logical deduction that since we the defendants

demonstrated an abundance of due process violations as well as fraud by the Plaintiffs this Court as well as the Court below erred in not granting our Motion to Vacate! If this Court chooses to allow Plaintiffs such as we have in the case at bar to be granted the opportunity to **COLLECT** their Sister State Judgments which are cloaked in fraud and blatant due process violations under Section 5400 then this section of our CPLR should be rendered **UNCONSTITUTIONAL.** It is **CLEAR** that under these circumstances this section is in violation of Amendment Fourteen, section one of the Constitution of the United States."

In Rubens' Reply Affidavit in Support they state: "... **AS THE UNREFUTED RECORD INDICATES AND THE UNREFUTED ARGUMENTS CONCLUDE** the plaintiffs fraudulently schemed to deny us of our Constitutional

right to Due Process of Law by not only failing to notify us of the trial and every proceeding leading up to the trial and not notifying us of the default and every proceeding leading up to the default and then not noticing us of the judgment and thereby not allowing us the opportunity to reopen and defend and win. These plaintiffs went on to fraudulently misrepresent to the court that they notified us of each and every proceeding.

This Court knows our procedures were timely.

It is the Chicanery of the Respondents in their Blatant disregard of our Constitutional Right to Due Process of Law that causes us to seek the help of this High Court."

In their affidavit in Opposition to the Plaintiff Respondants motion to dismiss their appeal to the State of New York Court of Appeals, Rubens stated:

"This Court has constitutional and statutory authority to resolve the issue of the appellants Right to Due Process of Law as provided by the Constitution of the United States of America. After Respondents 'appeared' in the Connecticut Action by way of answering the Summons and Complaint and Moving to Dismiss plaintiff's lack of responsive pleading to Appellant's affirmative defenses as provided by Connecticut procedure, Appellants received no further notices of any proceedings and assumed that Plaintiff's gave up their frivolous claim. Among the NOTICES that Appellants **DID NOT RECEIVE** were **NOTICE OF TRIAL** (to enable Appellants to appear and defend) **NOTICE OF DEFAULT JUDGMENT** (to enable Appellants to move to reopen the Connecticut Default within Connecticut's STRICT 4 MONTH RULE). To cover-up their **BLATANT DUE PROCESS VIOLATIONS OF AFFORDING ADEQUATE NOTICE,**

the Plaintiffs embarked on a fraudulent, deceptive and sanctionable course of conduct including committing FELONY PERJURY in affirming that Appellants knew of a trial date.

Minimal procedural due process is that parties whose rights are to be effected are entitled to be heard and in order to enjoy that right they must be notified. Puentes v. Shevin, 407 US 67, 79. It is equally fundamental that the right to notice and opportunity to be heard must be granted at a meaningful time and in a meaningful manner, Armstrong v. Manzo, 380 U.S. 545, 552. The right to a prior hearing has long been recognized by the Supreme Court under the Fourteenth and Fifth Amendment, the Court has traditionally insisted that whatever its form, opportunity for a hearing must be provided before deprivation of a right takes effect Bell v. Burson, 492 U.S. 535, 542;

Wisconsin v. Constantineau, 400 U.S. 433, 437; Goldberg v. Kelly, 397, U.S. 254.

The Consitutional issue is clear - the violations of Due process are apparent. If Section 5400 of the CPLR is permitted to be used by Plaintiffs, such as we have in this case at bar, to collect their Sister State Judgments which are cloaked in fraud and blatant **DUE PROCESS VIOLATIONS** then this Section of the CPLR should be rendered **UNCONSTITUTIONAL.**"

In the Rubens' Affidavit in Support of their motion to Reargue the dismissal of their appeal to the New York State Court of Appeals they stated that "The UNDISPUTED DUE PROCESS VIOLATIONS were passed over without comment by the Appellate Division.

In the case of Broddie v. Connecticut, the Supreme Court of the United States of America claimed that "... the right to due process reflects a fund-

amental value in our American constitutional system. Our understanding of that value is the basis upon which we have resolved this case, ...those who drafted the Fifth Amendment, and later those who drafted the Fourteenth Amendment recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the States' monoply over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things.

Due process requires, at minimum, that absent a contervailing state interest of overriding significance, persons forced to settle their claims of right to duty throughout the judicial process must be given a meaningful opportunity to be heard".

The lack of notices and opportunity to be heard in Connecticut was a denial of our Fifth Amendment right to due process of law.

The enforcement by the State of New York of foreign state judgements under the guise of CPLR Section 5400 which were rendered in the original forum without the requisite due process requirements is a violation of our Fourteenth Amendment rights to due process of law.

Because of the SUBSTANTIAL CONSTITUTIONAL questions directly involved, our appeal lies with this High Court as a matter of right.

In the case of Valz, et.al. v. Sheepshead Bay Bungalow Corporation, this Court held in 1928 that they had jurisdiction of a case on appeal taken without permission because it involved construction of State and Federal const-

itutions relative to denial of due process. The Court went on to hold that where a case involves questions whether judgment is a result of due process is a decisive question on appeal, appeal lies to the Court of Appeals as a matter of right."

In light of the forgoing it is clear that the Federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on Writ of Certiorari.

This Court since Marbury v. Madison, has seen to it that People in this country are treated fairly. This has not been the case with the Rubens in the prior proceedings. The constitutional violations have been consistantly and conspicuously undisputed. The Constitutional questions have been squarely presented by this Record. The Right to Due Process is a

fundamental value in our American Constitutional System.

This Court stated in Broddie v. Connecticut, 401 U.S. 371 (reargued November 17, 1970 and revised on March 2, 1971) that "... Assuming, as we must ... the truth of the undisputed allegations made by the Appellants ... the right to due process ... is the basis upon which we have resolved this case... those who drafted the Fifth Amendment and later those who drafted the Fourteenth Amendment recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property without due process of law, the States monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement

mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle."

New York State's overzealous approach towards recognition of Sister State Judgments under CPLR Section 5400 without the requisite DUE PROCESS guidelines has in effect rendered Section 5400 UNCONSTITUTIONAL as mandated by the Fourteenth Amendment to the Constitution of the United States.

The undisputed DUE PROCESS VIOLATIONS ABOUND the lower Courts failure to recognize and acknoweldge these violations requires clarification by this Court and the need for this clarification justifies issuance of this Writ.

CONCLUSION

WHEREFORE, Petitioner respectfully

prays this High Court to grant certiorari and issue a definitive pronouncement clarifying that DUE PROCESS REQUIREMENTS outweigh the BLIND SISTER STATE recognition of foreign judgments.

Petitioner respectfully prays that this Court grant plenary review, reverse the decision of the New York State Court of Appeals and hold that the Judgment obtained by default and through blatant due process violations be rendered VOID AND UNENFORCEABLE.

Respectfully submitted,

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Dated: April 10, 1994

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART I

- x

JULIANELLE SHINE,

Plaintiff,

-against-

RICHARD & BARBARA RUBENS,

Defendants.

- x

Hon. ANITA FLORIO

Motion by defendant to vacate a default judgment is disposed of as follows:

Plaintiffs were granted a judgment in Superior Court, State of Connecticut. A copy of the judgment was filed in this court on June 18, 1990 and on June 27, 1990 a judgment was rendered in favor of the plaintiff. On July 9, 1990 defendants were served with notice pursuant to CPLR 5403.

An examination of the Connecticut judgment reflects that same was not rendered by default or confession. Further defendants' motion to reopen the judgment was denied for untimeliness (Connecticut General Statutes, sec. 52-212a).

Plaintiff contends that this Court must give full faith and credit to a judgment of a sister state unless such judgment was obtained by default in appearance. Since such was not the case this motion must be denied.

Plaintiff's contention is correct.

Pursuant to CPLR 5401 judgments of any court are entitled to full faith and credit in this state with the exception of those obtained by default in appearance.

Upon the facts adduced herein it is clear that defendants appeared in the Connecticut action. The judgment was not obtained by default and is entitled to full faith and credit.

Defendants contention that they failed to appear for trial because plaintiff never notified them is unvailing. Once jurisdiction is conferred it is not divested by defendants' failure to appear at a later proceeding (Summerour & Associates v. Bradhill Industries, 91 A.D.2d 902; Sabrina D v. Thomas A. 110 Misc 2d 796; L & W Air Conditiong Co., Inc. v. Varsity Inc. of Rochester, 82 Misc 2d 937).

This Court has examined defendants remaining contentions and finds them without merit. The motion is denied. The stay is vacated. This constitutes the decision and order of the Court.

ANITA FLORIO

J.S.C.

Dated: December 23, 1991

FILED JAN - 9 1992

BRONX COUNTY CLERKS OFFICE

Sullivan, J.P., Rosenberger, Wallach, Asch, JJ.

47953N Shine, Julianelle, Karp, Bozelko & Karazin, P.C.,
Plaintiff-Respondent,

-against-

Richard and Barbara Rubens
Defendants-Appelants.

Order, Supreme Court, Bronx County (Anita Florio, J.), entered January 9, 1992, which denied defendant's motion to vacate a Connecticut judgment filed with the Bronx County Clerk, unanimously affirmed, with costs and disbursements.

Plaintiff law firm commenced this action in Connecticut to collect a fee. Defendants appeared pro se, interposing an answer that asserted, inter alia, lack of jurisdiction. According to plaintiff, when the case was called for trial, defendants failed to appear and defend, whereupon plaintiff was awarded judgment after a hearing was held to asses damages. Approximately five months later, on June

18, 1990, plaintiff filed a copy of the judgment in the Bronx County Clerk's office pursuant to CPLR 5402 and, on July 9, 1992, mailed a notice of filing to defendants pursuant to CPLR 5403. 4438 Douglas Avenue, Riverdale, New York, was specified in the notice of filing as defendants' address and in the accompanying affidavit as defendants' "last known address". However, according to the affidavit of service, defendants were served at 969 Third Avenue, New York, New York, the mailing address they used in the Connecticut litigation. Defendants claim that they were unaware that plaintiffs had taken any action against them until February 26, 1991, when they received an execution notice from the Sheriff.

There is no merit to defendant's contention that, contrary to the requirement of CPLR 5401, the Connecticut judgment was obtained by a default in appearance.

Defendants appeared in the Connecticut action by interposing an answer and jurisdiction, once conferred over them, was not divested by their failure to appear in the later stages of the proceeding (Summerour & Assocs. v. Bradhill Indus., 91 AD 2d 902). Although preserving an issue as to jurisdiction in their answer, defendants defaulted on that challenge as well when they thereafter failed to appear. Thereafter,the judgment was properly filed with the Bronx County Clerk, pursuant to CPLR 5402(a).

While the failure to serve defendants with the notice of filing at their "last known address" constituted a technical violation of CPLR 5403, the court did not err in denying defendants' motion to vacate the judgment. First of all, "[t]he mailing of notice of filing to the judgment debtor is not a jurisdictional act" (6 Weinstein Korn Miller, NY Civ Prac

par. 5403.01); "[a]ll that the judgment debtor can complain about is a want of jurisdiction, not in New York where he has property, but in the court which rendered the judgment" (Siegel, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR C5403:2). Moreover, defendants suffered no prejudice from the improper service since at the time they received the Sheriff's notice of execution they had the same remedies available - to raise objections of lack of jurisdiction and fraud or to have the judgment discharged if it had been satisfied - that they had when the notice of filing was improperly served on the Third Avenue address.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISIO,
FIRST DEPARTMENT
ENTERED: April 6, 1993

/s/ FRANCIS X. GALDI
Clerk.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

SHINE, JULIANELLE, KARP, BOZELKO & KARAZIN, P.C.,

Plaintiff-Respondent,

-versus-

RICHARD RUBENS and BARBARA RUBENS a/k/a BARBARA KRAUSS,

Defendants-Appellants.

Bronx County Clerk's
Index No. 14905/90
No. M-2639

NOTICE OF ENTRY

PLEASE TAKE NOTICE that attached is a true copy of an order duly made and entered and filed in the office of the clerk of the Appellate Division for the First Department on the 15th day of June, 1993.

Dated: New York, New York
June 24, 1993

EDWARDS & ANGELL
Attorneys for Plaintiff
Respondent
750 Lexington Avenue
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TO: RICHARD RUBENS and
BARBARA RUBENS
One East Beach Drive
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(516) 287-1348

RICHARD RUBENS and
BARBARA RUBENS
4439 Douglas Avenue
Riverdale, New York, 10471

Defendants-Appellants Pro Se

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 15, 1993

Present-
Hon. Joseph P.Sullivan Justice Presiding
Ernest H. Rosenberg
Richard W. Wallach
Sidney H. Asch, Justices

M-2639

- -x

Shine, Julianelle, Karp, Bozelko & Karazin, P.C., :

Plaintiff-Respondent, :

-against- :

Richard and Barbara Rubens,

Defendants-Appellants. :

- -x

Defendants-appellants having moved for reargument of, and, in the alternative for leave to appeal to the Court of Appeals from the decision and order of this Court entered on April 6, 1993 (Appeal No.47953N).

Now, upon reading and filing the papers with respect to said motion, and

due deliberation having been thereon,

It is ordered that said motion be and the same is denied, in its entirety, with $100 costs.

ENTER:

FRANCIS X. GALDI

Clerk

STATE of NEW YORK,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of October, 1993.

PRESENT, HON. JUDITH S. KAYE, Chief Judge, presiding.

Mo. No. 839

Shine, Julianelle, Karp, Bozelko & Karazin, P.C.,
Respondent,

v.

Richard and Barbara Rubens,
Appellants.

A motion having heretofore been made herein upon the part of the respondent to dismiss the apppeal taken as of right by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby granted and appeal dismissed with four hundred dollars costs and one hundred dollars costs of motion upon

the ground that no substantial constitutional question is directly involved.

/s/Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

STATE of NEW YORK,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of January 1994.

PRESENT, HON. JUDITH S. KAYE, Chief Judge, presiding.

Mo. No. 1363
Shine, Julianelle, Karp, Bozelko & Karazin, P.C.,
Respondent,
v.
Richard and Barbara Rubens,
Appellants.

A motion for reargument to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursments.

Judge Titone took no part.

5514

/s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court